LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

SUBMISSION IN RESPONSE TO THE PUBLIC CONSULTATION ON MEMBER STATE DISCRETIONS

4th ANTI-MONEY LAUNDERING DIRECTIVE AND FUNDS TRANSFER REGULATION

Department of Justice and Equality and the Department of Finance

4 March 2016

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Introduction

The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society's role in relation to the anti-money laundering ('AML') compliance duties of Irish solicitors falls into four distinct categories:

i. The Law Society informs solicitors about their AML duties and raises awareness of money laundering and terrorist financing risks;
ii. The Law Society provides both general and tailored guidance;
iii. The Law Society educates solicitors about their AML duties;
iv. The Law Society is the competent authority for the monitoring of solicitors for the purposes of compliance with the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* ('the 2010 Act') and the *Criminal Justice Act 2013*.

The Law Society welcomes the opportunity to make a submission to the Department of Justice and Equality and the Department of Finance ('the Departments') in relation to member state discretions as contained in the Directive (EU) 2015/849 on the Prevention of the use of the Financial System for the Purposes of Money Laundering or Terrorist Financing ('4AMLD').

We wish to make observations in relation to two specific member state discretions as highlighted in the invitation for submissions ('the Consultation Document') – these member state discretions are:

- Beneficial ownership register (corporates);
- Beneficial ownership register of trusts.

This submission will also take the opportunity to address the Departments in relation to certain other issues arising out of the 4AMLD, as a response to part 8 of the Consultation Document. The Law Society considers that these issues warrant further examination at this point in time – they are as follows:

- The treatment of solicitor client accounts;
- The transposition of the 4ALMD.

Executive Summary

- The Law Society considers that the level of access to the register of beneficial ownership for corporate and other legal entities should be restricted only to those persons identified in Article 30(5)(a)-(c) and should not be extended to the "*public at large*".

- The Law Society believes that extending access to the public at large will not add any competitive advantage to the State and those doing, or thinking of doing, business in Ireland. On the contrary, there is a risk that an unrestricted central register would result in a competitive disadvantage to some business sectors as other Member States may not take the approach of unrestricted public access to information on beneficial ownership.

- The Law Society agrees with the exemption in the cases of the exceptional circumstances as outlined in the 4AMLD but has concerns over the manner in which the restriction of access to certain types of personal information would be determined in the transposing legislation. One sensible approach would be to leave the matter of what is an exceptional circumstance to the discretion of the directors on the basis that they must act reasonably and in good faith. There could be consequences for directors who fail to act in such a manner.

- The creation of obligations requiring share owners to provide the relevant beneficial ownership information to companies at specific key stages in relation to their holding of these shares (for example, in the creation, holding, or transfer of such shares) would be fundamental to companies meeting their obligations to gather such information.

- The Law Society considers that transposition of the 4AMLD should seek to ensure the protection of vulnerable persons and the privacy of families, and it should not impose disproportionate administrative burdens on trusts.

- The Law Society submits that trust structures used by charities, pensions and the financial services industry (e.g., UCITS, unit trusts) which have their own reporting and regulatory regimes that can link into a money laundering perspective, and to the extent bare trusts, nominee arrangements and regulated trusts (e.g., pension schemes, unit trusts etc.) are either look through or exempt from tax, should be excluded under Irish legislation from the ambit of express trust for Irish purposes.

- The Law Society is supportive of the Revenue Commissioners' openness to be the body that will maintain the register under Article 31(4), particularly as this will allow the privacy of families and vulnerable persons to be maintained, and enable a reduced administrative burden of reporting because of the existing tax reporting obligations to Revenue already in place for trusts.

- A comprehensive system of reporting obligations to Revenue already exists when a trust generates tax consequences, In order to minimise unnecessary administrative

duplication, the Law Society suggests that the existing framework should be used as much as possible to satisfy the reporting obligations under Article 31 (4). These can be modified where required.

- The suggestion in Article 31.4 that access to the register may be available to obliged entities is a matter of concern. As the information on the register will concern families and vulnerable individuals, confidentiality is a critical issue and must be maintained in the Irish transposition of the 4AMLD.

- The Law Society is strongly of the view that Simplified Client Due Diligence ('simplified CDD') should continue to apply to lawyers' pooled client accounts under the 4AMLD.

- The Law Society considers that failing to apply simplified CDD to solicitor client accounts would create a disproportionate compliance requirement for all involved – the legal profession and financial institutions - without having any effect or benefit on deterring money laundering and terrorist financing. It would have far-reaching consequences for the operation of legal services in Ireland, a potentially negative impact on the right of access to the law, and impede the daily operations of both law firms and financial institutions.

- The Law Society considers that solicitors' client accounts would fall under the non-exhaustive list heading of "*customer risk factors*" (as contained in Annex II of the 4AMLD), as this account facility is low risk (or "*lower risk*") in nature. There has been no change to the nature of this type of account, nor have there been any events or data to suggest that they now should suddenly constitute or pose a 'high risk'.

- The Law Society suggests that round-table discussions between the relevant Departments (e.g., the Department of Justice and Equality, Department of Finance, and also the Department of Jobs, Enterprise and Innovation) and all of the Competent Authorities (for the purposes of the 4AMLD) would be of considerable assistance to all involved in, and affected by, the transposition of the 4AMLD. Such discussions among all relevant stakeholders would equally work towards smoothing the progress of implementation of the transposed 4AMLD.

- The Law Society would welcome the opportunity to review and offer constructive comments on any drafts of legislation and guidance being produced. This has apparently been the approach in the UK with interested stakeholders, and it would be useful to adopt the same approach here, particularly in light of the anticipated impact on Irish business and the need to avoid a situation whereby divergences in practice emerge between the North and South.

Beneficial ownership register (corporates)

1.1. For the purposes of this section, any reference to 'company/companies' should be understood to refer to any private or public company or corporate entity under Irish law.

1.2. This section of the submission is drafted in response to the specific questions raised at page 11 ('Question Box 3'), under the section of 'Beneficial ownership register (corporates)', section 3, pages 9-11 of the Consultation Document.

Should access to the register of beneficial ownership for corporate and other legal entities be restricted as set out in Article 30(5), (a) – (c) or should access to be extended to the public at large?

1.3. The Law Society's considered opinion is that the level of access to the central register should be restricted only to those persons identified in Article 30(5)(a)-(c) and should not be extended to the "public at large".

Impact on companies

1.4. Irish companies have to deal with a seemingly ever-increasing burden of corporate regulation, and imposing a further obligation on them to maintain "*adequate, accurate and current"* registers of beneficial ownership available to the public on an unrestricted basis will impose further "red tape". It would result in the incurrence of management time and costs in dealing with any such requests from the public and without any proven benefit.

Competitive Effect

1.5. The Law Society believes that extending access to the public at large will not add any competitive advantage to the State and those doing, or thinking of doing, business in Ireland. On the contrary, there is a risk that an unrestricted central register would result in a competitive disadvantage to some business sectors as other Member States may not take the approach of unrestricted public access to information on beneficial ownership. From solicitors' experience, feedback from companies indicates that, while they have no desire to "hide" anything *per se,* they do have legitimate concerns that the level of information available (with unrestricted access to the public) could result in media outlets focusing on small parts or aspects of disclosures for their own business interests rather than the public good. While perhaps not exactly a case in point, it is believed that Luxembourg as a jurisdiction has suffered in this regard from the "LuxLeaks" journalist investigation that occurred in 2014.

Listed Companies

1.6. Unlike private companies, certain shareholders and officers of listed public companies are already obliged to disclose beneficial ownership at a certain level under the Irish Listing

Rules (ISE), the Takeover Regulations and the Takeover Rules. In addition, listed public companies, unlike private companies, have multiple daily transfers of the legal and beneficial interests in their shares. The disclosure level typically begins at 3%, which is considerably lower than the approximately 25% threshold in the 4AMLD. The Law Society believes that listed public companies should be excluded to the maximum extent possible from obligations in relation to beneficial ownership registers in the transposing legislation.

Whether beneficial owners of companies should be able to apply, on a case by case basis, to restrict public access to some types of personal information such as residential addresses or dates of birth (Article 30(9))? What categories of personal data might enjoy such exemption? What circumstances could justify the exempting of data?

1.7. The Law Society agrees with the exemption in the cases of the exceptional circumstances as outlined in the 4AMLD but has concerns over the manner in which the restriction of access to certain types of personal information would be determined in the transposing legislation. One sensible approach would be to leave the matter of what is an exceptional circumstance to the discretion of the directors on the basis that they must act reasonably and in good faith. There could be consequences for directors who fail to act in such a manner.

1.8. Another approach, which should be avoided in the opinion of the Law Society, would be a requirement that a company produce evidence from third parties, such as An Garda Síochána, to the effect that they are satisfied there is evidence of any such exceptional circumstances (fraud, violence etc.). On the basis of solicitors' experience in relation to what is required pursuant to the *Companies Act 2014 (Section 150) (No. 2) Regulations 2015*, this effectively would render the exemption of very limited, if any, value. These Regulations, like their predecessor, require a supporting statement from an officer of An Garda Síochána, *not below the rank of Chief Superintendent*, that the company officer's personal safety or security warrant the granting of an exemption, before it is lawful to dispense with the requirement that the usual residential address of an officer of a company appear on the records kept by the Registrar of Companies, the company's register of directors and secretaries, and the company's register of members. In the Law Society's view, this is an onerous requirement and is much more difficult than it should be to obtain in legitimate cases where it is required.

Suggested approach to assist companies in gathering the information

1.9. In the Law Society's view, the imposition of this obligation on companies to collect and hold "*adequate, accurate and current*" beneficial ownership information will create a significant burden for companies, both in terms of resources and the practical difficulties of meeting such an onerous obligation.

1.10. When a company is formed, its shareholders should be required to declare that either they are the legal and beneficial owner of the shares, or if this is not the case, they would be required to confirm who the beneficial owner(s) actually are. It would also be essential that

an obligation would rest with the old and new beneficial owners to notify both the company and the legal owner of any change in beneficial ownership, and to do so in a timely manner.

1.11. It is not clear how often a company would have to make enquiries of the share owners in order to ensure that such information is “current”. Failure on the part of the beneficial owner to provide this information should not result in a company being penalised for a change in circumstances beyond its control.

1.12. The creation of obligations requiring share owners to provide the relevant beneficial ownership information to companies at specific key stages in relation to their holding of these shares (for example, in the creation, holding, or transfer of such shares) would be fundamental to companies meeting their obligations to gather such information.

Beneficial ownership register of trusts

2.1. This section of the submission is drafted in response to the specific questions raised at page 13 ('Question Box 4'), under the section of 'Beneficial ownership register of trusts', section 4 (pages 11-13) of the Consultation Document.

2.2. However, in relation to the specific issue of exemptions to register details of certain beneficial owners of shares under Article 30(9) (as referenced in 'Question Box 3', at page 11), the Law Society submits that there should be an exemption from the obligation to maintain details of beneficial owners of companies in respect of individuals who because of age or improvidence, or of physical, mental or legal incapacity, are incapable of managing their affairs. In this context, the Revenue exemption for persons with such vulnerabilities in the context of discretionary trusts would be useful criteria to apply in Irish legislation.

2.3. In general terms, the Law Society considers that transposition of the 4AMLD should seek to ensure the protection of vulnerable persons and the privacy of families, and it should not impose disproportionate administrative burdens on trusts.

Types of trust structures

2.4. Article 31.1 refers to trustees of any "*express trust*" which term is extremely wide from an Irish context.

2.5. The Law Society submits that trust structures used by charities, pensions and the financial services industry (e.g., UCITS, unit trusts) which have their own reporting and regulatory regimes that can link into a money laundering perspective, and to the extent bare trusts, nominee arrangements and regulated trusts (e.g., pension schemes, unit trusts etc.) are either look through or exempt from tax, should be excluded under Irish legislation from the ambit of express trust for Irish purposes.

Tax Residence

2.6. The current wording in Article 31.1 refers to trusts governed by Irish law which allows for the unscrupulous to avoid reporting in certain instances.

2.7. The Law Society considers that the concept of tax residence provides a more precise test for imposing the obligations under the 4AMLD, and we suggest that this test should be adopted for Irish purposes. The test for residence set out in Section 574(1)(a) *Taxes Consolidation Act 1997* ('TCA') is the most appropriate residency test in this regard.

Reporting obligations

2.8. The Law Society is supportive of the Revenue Commissioners' openness to be the body that will maintain the register under Article 31(4), particularly as this will allow the privacy of families and vulnerable persons to be maintained, and enable a reduced administrative burden of reporting because of the existing tax reporting obligations to Revenue already in place for trusts.

2.9. The legislation should confirm that "*tax consequences*" for Irish legislative purposes means Irish tax consequences only.

2.10. A comprehensive system of reporting obligations to Revenue already exists when a trust generates tax consequences, including the following:

- the registration of the trust if it holds assets under form TR1;
- ongoing filing of trust income and chargeable gains in accordance with their tax compliance obligations under Form 1, including chargeable gains arising on distributions from trusts under s579 and s579A TCA, exit charges under s579B, 579E and 579F TCA;
- the registration of discretionary trusts (Form DT1) under section 46(15) *Capital Acquisitions Tax Consolidation Act 2003* ('CATCA');
- the obligations of practitioners to report under section 896A TCA;
- the information provided under form CA24 (Inland Revenue Affidavit) at Part 6 Question 10 in the case of Will trusts;
- on distributions from trusts where income has been earned, there is an obligation on a trustee under Section 246 of the Taxes Consolidation Act to apply withholding tax at the standard rate of income tax and to disclose details to the Revenue by filing a Form R185;
- the mandatory reporting regime for inter vivos trusts under Section 817D TCA;
- the regulation of charitable trusts with Revenue in seeking charitable tax status.

2.11. In order to minimise unnecessary administrative duplication, the Law Society suggests that the existing framework should be used as much as possible to satisfy the reporting obligations under Article 31 (4). These can be modified where required.

2.12. However, as there is no longer any specific obligation on a trustee to report in respect of capital distributions from trusts which generate tax consequences other than as listed above, the Law Society considers that the previous obligation on trustees under CATCA to file details of distributions applied where the distribution aggregated with previous gifts/inheritances exceeded 80% of the relevant Group Threshold, as defined in the CATCA, could be introduced in this context.

2.13. The Law Society submits that the suggestion that a general provision in relation to '*movement of funds*' is not appropriate as the movement of funds that do not generate tax consequences are not under the ambit of the 4AMLD.

Access to the register

2.14. The suggestion in Article 31.4 that access to the register may be available to obliged entities is a matter of concern. As the information on the register will concern families and vulnerable individuals, confidentiality is a critical issue and must be maintained in in the Irish transposition of the 4AMLD.

2.15. Furthermore, where the Irish competent authority exchanges information with another EU competent authority, we submit that measures should be put in place under the Irish legislation to require the Irish competent authority to ensure that third parties cannot access this information through the other EU competent authority.

Other Issues

3.1. The Law Society considers that two further issues warrant further examination under this specific heading:

A. The treatment of solicitor client accounts (Simplified Client Due Diligence);
B. The transposition of the 4ALMD.

A. SOLICITOR CLIENT ACCOUNTS

3.2. The Law Society is strongly of the view that Simplified Client Due Diligence ('simplified CDD') should continue to apply to lawyers' pooled client accounts under the 4AMLD. Lawyers' pooled client accounts are a well-established feature of most European legal systems (e.g., Ireland, Austria, Germany, Luxembourg and the UK, etc.). In Ireland, such an account is called a solicitor client account.

3.3. Pooled client accounts are accounts held by legal professionals with a financial institution. Solicitors are required by the *Solicitors Acts 1954 – 2008* to have a separate client account to hold client monies. The purpose of these accounts is to hold client monies for a purpose designated by the client. Money will either be held or received for payment of costs incurred by the legal professional on behalf of the client or for specific transactions on which the legal professional is advising. Only funds received, held or controlled by a solicitor in connection with his or her practice as a solicitor are permitted to pass through a client account. The use and management of solicitor client accounts are subject to regulation by the Law Society (see section below - '*National Discretions in the 4AMLD*' - for further detail).

3.4. The Law Society considers that failing to apply simplified CDD to solicitor client accounts would create a disproportionate compliance requirement for all involved – the legal profession and financial institutions - without having any effect or benefit on deterring money laundering and terrorist financing. It would have far-reaching consequences for the operation of legal services in Ireland, a potentially negative impact on the right of access to the law, and impede the daily operations of both law firms and financial institutions.

Simplified Client Due Diligence: the approaches of the 3AMLD and the 4AMLD

3.5. Article 11(2)(b) of the 3rd Anti-Money Laundering Directive (2005/60/EC)[1] ('3AMLD') related to the application of simplified CDD to lawyers' pooled client accounts (a solicitor client account in Ireland). It was transposed through sections 34(2) and 34(4) of the *Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013* ('the AML legislation').

[1] Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:EN:PDF

3.6. Article 11(2)(b) of the 3AMLD stated that "… *Member States may allow the institutions and persons covered by this Directive not to apply customer due diligence in respect of* …

> (b) beneficial owners of pooled accounts held by notaries and other independent legal professionals from the Member States ... and provided that the information on the identity of the beneficial owner is available, on request, to the institutions that act as depository institutions for the pooled accounts."

3.7. Sections 34(2) and 34(4) of the AML legislation state:

> "(2) A credit institution is not required to apply the measures specified in section 33(2)(b) in respect of the beneficial ownership of money held, or proposed to be held, in trust— (a) in a client account, within the meaning of the Solicitors (Amendment) Act 1994;
>
> ....
>
> (4) A credit institution may apply the exemption provided for in subsection (2) in relation to the beneficial ownership of money held in trust in a credit institution only if the credit institution is satisfied that information on the identity of the beneficial owners of the money held in the account is available, on request, to the credit institution."

3.8. In summary, the effect of applying simplified CDD to solicitors' client accounts means that solicitors do not have to produce or supply their bank with AML identification documentation in respect of clients when setting up or operating a solicitor client account.

3.9. The content and effect of article 11(2)(b) has not been carried over in a similar manner in the 4ALMD.

3.10. A different approach has been adopted towards simplified CDD in the 4AMLD by virtue of Articles 15 and 16. A far broader approach has been adopted - framed in general terms - with greater discretion being left to the member states in relation to deciding what should or should not be eligible for simplified CDD. Articles 15 and 16 state:

> "Article 15
>
> 1. Where a Member State or an obliged entity identifies areas of lower risk, that Member State may allow obliged entities to apply simplified customer due diligence measures.
>
> 2. Before applying simplified customer due diligence measures, obliged entities shall ascertain that the business relationship or the transaction presents a lower degree of risk.
>
> 3. Member States shall ensure that obliged entities carry out sufficient monitoring of the transactions and business relationships to enable the detection of unusual or suspicious transactions.
>
> Article 16
>
> When assessing the risks of money laundering and terrorist financing relating to types of customers, geographic areas, and particular products, services, transactions or delivery channels, Member States and obliged entities shall take into account at least the factors of potentially lower risk situations set out in Annex II."

3.11. In summary, the approach outlined in these Articles consists of the Member State identifying "*areas of lower risk*", and then allowing obliged entities to apply simplified CDD provided that the obliged entities have ascertained that the "*business relationship or the transaction presents a lower degree of risk*". In assessing the level of risk of money laundering and terrorist financing, member states are to "*take into account at least the factors of potentially lower risk situations set out in Annex II*" of the 4AMLD.

3.12. Annex II contains "*a non-exhaustive list of factors and types of evidence of potentially lower risk*". These factors are grouped under three headings:

- *customer risk factors;*
- *product, service, transaction or delivery channel risk factors; and,*
- *geographical risk factors.*

3.13. Therefore, it is left to the member states to consider the *non-exhaustive* list of factors contained in Annex II, and to then determine what they consider to be the different types of customers, products, services or transactions, etc., that are low risk and therefore subject to simplified CDD.

3.14. Although not explicitly listed as a category eligible for simplified CDD, Annex II is expressly described as "*non-exhaustive*", and it is thus open to member states to continue to allow simplified CDD to apply to lawyers' pooled client accounts.

3.15. The Money Laundering Task Force of the Law Society of England and Wales stated in its '*Joint Consultation Paper – European Banking Supervisors*' (January 2016) that it engaged in correspondence with the European Commission on this very issue of pooled client accounts. It was assured that "*the reason for the specific exemption for PCAs being omitted from the Commission text of 4MLD was to enable member states to take a risk-based approach and decide which vehicles were appropriate for SDDD, rather than giving any indication of perceived added AML risk associated with PCAs*".

3.16. It is the considered view of the Law Society of Ireland that the above interpretation correlates precisely with the meaning of the text contained in Articles 15 and 16 of the 4AMLD.

The application of Simplified CDD to solicitor client accounts

3.17. The Law Society considers that solicitors' client accounts would fall under the non-exhaustive list heading of 'customer risk factors', as this account facility is low risk (or 'lower risk') in nature. There has been no change to the nature of this type of account, nor have there been any events or data to suggest that they now should suddenly constitute or pose a 'high risk'.

3.18. Indeed, the change in the revised FATF Recommendations[2] – which form the basis of the 4AMLD - is essentially this emphasis on risk and the 'risk-based' approach. Thus, rather

[2] FATF Recommendations 2012

than listing an exhaustive number of express exemptions to CDD (e.g., a list of specific entities or products that can be subject to simplified CDD), the approach is broader and focussed on assessing risk in deciding what level of CDD should apply.

3.19. The new low risk criteria (as contained in the revised FATF Recommendations), provides as follows in relation to 'DNFBPs' (designated non-financial businesses and professions):

> "When assessing the money laundering and terrorist financing risks relating to types of customers, countries or geographic areas, and particular products, services, transactions or delivery channels, **examples of potentially lower risk situations include the following**:
>
> (a) Customer risk factors:
>
> Financial institutions and DNFBPs – where they are subject to requirements to combat money laundering and terrorist financing consistent with the FATF Recommendations, have effectively implemented those requirements, and are effectively supervised or monitored in accordance with the Recommendations to ensure compliance with those requirements."[3]

3.20. On this basis, the pooled client account facility, in the absence of any evidence to the contrary, should continue to be treated as low risk. Ireland would be meeting its obligations under the 4AMLD and the FATF Recommendations by retaining the current status of PCAs in the legislation transposing the 4AMLD.

3.21. The Law Society would welcome confirmation from the Departments that solicitor client accounts will continue to be viewed as low risk and thus be subject to simplified CDD. The Law Society is happy to meet with representatives from the Departments to discuss in further detail the operation of this account facility and provide any further information or clarification that might be required.

Factors in favour of applying Simplified CDD to solicitor client accounts

3.22. In addition to the nature of the facility being low risk, there are numerous, significant, administrative and practical difficulties which would be created by not applying simplified CDD to this pooled client account facility ('PCA' or 'PCAs'). Furthermore, there is little evidence to suggest that such an approach would greatly reduce the risk of money laundering. Examples of these difficulties are outlined below.

3.23. It would not be feasible or practical to eliminate the PCA facility and require a solicitor to open, maintain, and later close, new bank accounts for each and every client file, as the number of accounts required as a result would number in the hundreds for small to mid-sized firms, and run to far higher amounts for larger firms. Additionally, the volume and speed of transactions can vary hugely, with funds continually changing. It is highly probable that the cost of any increased administrative burden would have to be borne by clients.

[3] *Ibid* at pg. 64 – 'Interpretative Note to recommendation 10, 'H – Risk Based Approach', 'Lower Risks', paragraph 17(a).

3.24. Equally, the option of restricting or limiting the operation of a PCA - for example, by requiring solicitors to provide the identification details of each and every client to a financial institution - would impose a similar substantial burden on solicitors' clients, and the financial institutions. If a financial institution was required to identify all the beneficial owners within PCAs, they would essentially be seeking information about funds held by hundreds, if not thousands, of clients of solicitors' firms each day, with no other context being provided besides the fact that the person is using a solicitor. Furthermore, even if a restriction of this nature (i.e., the provision of client identification details to a financial institution) was limited to the extent that solicitors were allowed to differentiate between client monies which stem from AML regulated legal services and client monies relating to legal services outside the scope of AML regulation, presumably some form of justification for this differentiation would then also have to be furnished to the financial institution in question.

3.25. The Law Society is strongly of the view that the introduction of these kinds of procedures (e.g., the provision of the names of clients who have monies in a PCA) would, in effect, have a minimal impact upon reducing any risk of money laundering as the provision of such isolated information, without further context, will not assist the financial institution, in the majority of cases, in determining if there is a risk of money laundering. It is only the professional with knowledge of the underlying transactions, i.e., the legal professional/the solicitor, who can assist effectively in determining if there is any risk of money laundering. Solicitors are already subject to statutory obligations under the AML legislation, such as CDD and reporting obligations, and are regulated for compliance with these obligations by their competent authority – the Law Society.

3.26. The Law Society considers that the complete removal of PCA facilities or the partial restriction of their operation would impose an oppressive administrative and financial burden upon solicitors with little tangible benefit accruing to the fight against money laundering. In reality, it would needlessly duplicate the application of Client Due Diligence measures, such that the AML identification process would be carried out in or around the same period of time, in respect of the same client and the same legal services, by two different designated persons - first by a solicitor, and then again by a financial institution. In effect, it would simply create further 'red tape' or a type of 'box-ticking' exercise for financial institutions, and would particularly constitute a drain on the resources of solicitors and also financial institutions.

National Discretions in the 4AMLD (Article 48(9))

3.27. Finally, the Law Society is strongly of the view that the member state discretion contained in Article 48(9) of the 3AMLD (i.e., regarding the discretion to allow obliged entities to carry out supervision in relation to AML/CTF), as referred to in the consultation document (at p. 5), provides the basis on which the Departments could continue to apply simplified CDD to solicitor client accounts. The evidence supporting this view is outlined below.

3.28. Solicitor client accounts are the subject of regulation and scrutiny by the Regulation Department of the Law Society in the following ways.

3.29. Section 60 of the AML legislation appoints the Law Society as the competent authority for the monitoring of solicitors for the purposes of compliance with the 2010 and 2013 Acts

3.30. Section 63 sets out the functions and duties of a competent authority. Under section 63(1), the Law Society is obliged to "*effectively*" monitor designated solicitors and the Law Society is also required to take measures "*that are reasonably necessary for the purpose of securing compliance*" by solicitors with their AML obligations. Section 63(2) provides that these measures may include reporting to An Garda Síochána and the Revenue Commissioners "*any knowledge or suspicion*" it has that a solicitor "*has been or is engaged in money laundering or terrorist financing*".

3.31. The Law Society is statutorily obliged to monitor solicitors' compliance with the *Criminal Justice (Money Laundering & Terrorist Financing) Acts 2010 to 2013*. Accordingly, in the course of attendance at a solicitor's firm for the purpose of investigating whether there has been due compliance with the *Solicitors Accounts Regulations 2014*, the Law Society's investigating accountant is required to ascertain whether the firm has established appropriate policies and procedures in order to prevent and detect activities related to money laundering and terrorist financing.

3.32. The Investigating Accountants are specifically instructed that it is not sufficient to rely on representations from the solicitor that procedures are in place; verification of compliance is required to be carried out in the course of examining client files. The investigating accountant examines a sample of files specifically to see if the anti-money laundering procedures are being applied in practice. Enquiry is also made as to whether any anti-money laundering reports have been made.

3.33. The existence of appropriate anti-money laundering procedures, or the absence thereof, must be specifically disclosed in the investigating accountant's report. The results of the examination of a sample of files to ascertain whether the anti-money laundering procedures are being implemented must also be included in the investigation report.

3.34. As part of the role of the investigating accountant is to ascertain whether there is due compliance with the *Solicitors Accounts Regulations 2014* or evidence of misconduct by the solicitor, the investigating accountant will examine a sample of transactions conducted by the solicitor. Particular attention is paid to any evidence of dishonesty. In the course of examining the firm's books of account the investigating accountant will pay particular attention to any complex/unusually large transactions, unusual patterns of transactions with no apparent economic or lawful purpose, and any other activities that the investigating accountant has reasonable grounds to regard as particularly likely, by their nature, to be related to money laundering or terrorist financing.

3.35. If such a transaction is encountered, enquiry is made as to how the solicitors dealt with this matter in terms of complying with their anti-money laundering obligations. The investigating accountant will include details of such a transaction in the investigation report. Where the investigating accountant has a suspicion that the transaction may relate to money laundering or terrorist financing either by the solicitor, or by a client of that solicitor, that

transaction is included in a report to the Law Society's money laundering reporting committee.

3.36. The Law Society's money laundering reporting committee ('the committee') is one of the Law Society's standing committees. It has a statutory remit underpinned by a legal obligation on behalf of the Law Society, which is a competent authority, to report any suspicions that money laundering or an offence of financing terrorism has been committed by a practising solicitor or a client of a solicitor, pursuant to Section 63 of the *Criminal Justice (Money Laundering & Terrorist Financing) Acts 2010 and 2013*, to the relevant authorities.

3.37. It also is obliged to report any information which it knows or believes might be of material assistance in preventing the commission of a relevant offence (which includes money laundering) for the purpose of the *Criminal Justice Act 2011* or securing the apprehension, prosecution or conviction of a person for such a relevant offence, to disclose that information as soon as it is practicable to An Garda Síochána.

3.38. The committee meets on a regular basis to consider internal reports submitted by the investigating accountants or other Law Society employees such as solicitors dealing with complaints or practice closures. The decision to refer a matter to An Garda Síochána and the Revenue Commissioners rests with the committee. The committee is made up of a number of members of the profession who are or who have occupied the position of Chairman or Vice-Chairman of the Law Society's Regulation of Practice Committee, as well as a lay member who is a qualified chartered accountant. The Law Society's Director of Regulation is also a member of the committee and executive support for the committee is provided by senior personnel within the Law Society.

3.39. Therefore, it is clearly evident that rigorous procedures are in place for monitoring the use of solicitor client accounts in both the context of anti-money laundering obligations and the use and management of solicitor client accounts.

3.40. The discretion contained in Article 48(9) of the 4AMLD says that member states shall require competent authorities to monitor effectively, and to take measures necessary to ensure compliance. It is evident that the Law Society, as the profession's competent authority, is monitoring effectively the use of solicitor client accounts in relation to solicitors' statutory obligations.

3.41. Ensuring that simplified CDD continues to apply to the solicitor client accounts will avoid the difficulties and complications identified at paragraphs 3.22 - 3.27; furthermore, such an approach can be easily adopted in the context of articles 15 and 16 (and Annex II) of the 4AMLD, while also observing the spirit of Article 48(9) as was contained in the 3AMLD.

B. TRANSPOSITION OF THE 4AMLD

3.42. The Law Society urges the Departments to co-ordinate their efforts inter-departmentally in transposing the 4AMLD. The input of other government departments, particularly the

Department of Jobs, Enterprise and Innovation in respect of the beneficial ownership issues, will prove vital in facilitating a balanced and consistent approach to the implementation of all of the provisions of the 4AMLD.

3.43. The Law Society further suggests that round-table discussions between the relevant Departments (e.g., the Department of Justice and Equality, Department of Finance, and the Department of Jobs, Enterprise and Innovation) and all of the Competent Authorities (for the purposes of the 4AMLD) would be of considerable assistance to all involved in, and affected by, the transposition of the 4AMLD. Such discussions among all relevant stakeholders would equally work towards smoothing the progress of implementation of the transposed 4AMLD.

3.44. It has come to the Law Society's attention that advisors, as well as businesses, in the UK have had an opportunity, over a number of months, to see drafts of the intended legislation for the UK, in addition to drafts of the proposed guidance from the UK government. The Law Society considers that it would be equally useful to adopt the same approach here, particularly in light of the anticipated impact on Irish business and the likely compliance costs that will arise regarding the issues of beneficial ownership registers.

3.45. The Law Society would be very willing to offer constructive comments which may assist the Departments involved in transposition. A similar process in relation to the recent companies' legislation between the relevant Departments and the Business Law Committee of the Law Society worked extremely well for all involved.

3.46. Finally, will there be guidance made available regarding how to comply with the new measures in the 4AMLD? This is a particular concern of the Law Society in relation to the issues of beneficial ownership as all involved must wish to avoid a situation whereby divergences in practice emerge between businesses in the North and in the South.

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